NOTE

INTER-JURISDICTIONAL CERTIFICATION: BEYOND ABSTENTION TOWARD COOPERATIVE JUDICIAL FEDERALISM *

I. THE ABSTENTION DOCTRINE

Since 1938, the doctrine of *Erie R.R. v. Tompkins* [1] has served as a cornerstone for the foundation of federalism.[2] *Erie* made clear [3] that a federal court with diversity or pendent jurisdiction [4] over questions of state law must [5] decide those questions by applying the rules and principles established by the state courts, not by fashioning "federal general common law." [6] Federal courts were not to make state law,[7] for their jurisdiction rested on the theory that they were merely alternative forums for the application of state law,[8] available to potential state litigants only to ensure evenhanded application of state law and unbiased fact finding.[9] This vital *Erie* principle has generated the doctrine of abstention.[10]

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* The title of this Note was adapted from Kurland, *Toward a Co-operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481 (1960).

[1] 304 U.S. 64 (1938).

[2] See generally Hill, *The Erie Doctrine and the Constitution* (pts. 1-2), 53 NW. U.L. REV. 427, 541 (1958).

[3] Under the rule of Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), a federal court was bound to accede to state court interpretations of state statutes, but this was the full content of "rules of decision." Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 92. See HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 615 (1953). See generally *id.* at 614-21.

[4] A federal court has the right to decide all questions in the case, "even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only." Siler v. Louisville & N.R.R., 213 U.S. 175, 191 (1909). A federal court cannot, however, assume jurisdiction of state questions if they are "separate and distinct" from the federal question. Hurn v. Oursler, 289 U.S. 238, 245-46 (1933). Although *Erie* itself dealt only with diversity jurisdiction, its basic principle—"uniformity of decision by all courts within the same state—is equally applicable to pendent jurisdiction cases." Note, *The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts*, 62 COLUM. L. REV. 1018, 1043 n.142 (1962). See 24 U. CHI. L. REV. 543 (1957).

[5] In *Erie*, Mr. Justice Brandeis stated in dictum that the doctrine of Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), which *Erie* overruled, must be abandoned because "the unconstitutionality of the course pursued has now been made clear." 304 U.S. at 77-78. This dictum, however, has been widely questioned and never affirmed in holding by the Supreme Court. See Hill, *supra* note 2, at 427 n.3, and authorities therein cited.

[6] Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).

[7] See Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267, 271 (1946).

[8] See Note, *Abstention: An Exercise in Federalism*, 108 U. PA. L. REV. 226, 229 n.26 (1959); Note, 59 COLUM. L. REV. 504 (1959), and cases therein cited.

[9] *Cf.* 304 U.S. at 74: "Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State."

[10] *Cf.* Vestal, *The Certified Question of Law*, 36 IOWA L. REV. 629, 644-45 (1951).

In certain cases, a federal court may be unable to determine with certainty the present content of applicable state law because an authoritative state court has not yet decided the question—involving, for example, a previously unconstrued state statute—and because that question is difficult and uncertain.[11] The federal court must then try to predict what the highest state court would determine, and indeed, the federal district judge, who is usually a member of the bar of the state in which he sits, is probably as well-equipped as a state trial judge to forecast state law. But this forecast by a judge not empowered to make state law is not reviewable by any state court.[12] The doctrine of abstention has been developed, therefore, to enable a federal court to abstain from deciding such unsettled questions of state law even though federal jurisdiction has been properly invoked, leaving the litigants to obtain an answer to the question in the state courts.[13]

Traditionally, abstention was based on the exercise of equity discretion in two types of cases: in suits brought to enjoin state action because of federal unconstitutionality, when preliminary state law questions were new and unclear, the federal court stayed the federal action to enable the state courts to decide these questions in light of the constitutional objections,[14] but retained jurisdiction should a federal adjudication still be necessary;[15] when a federal injunction would result in unwarranted federal-state friction by disrupting state administrative processes,[16] the collection of state taxes,[17] or the general execution of local policies,[18] the federal courts abstained on the basis of comity and dismissed the suit. In *Louisiana Power & Light Co. v. City of Thibodaux*,[19] the dimensions of abstention were significantly altered; no longer was abstention confined to cases in equity, and the easy categorization of cases as constitutional-therefore-stay or local-disruption-therefore-dismissal was overturned. In *Thibodaux*, the district court stayed state eminent domain proceedings, which had been removed to federal court on the basis of diversity of citizenship, so that the state judiciary

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[11] For discussion of the terms "unsettled," "uncertain," and "difficult," see Note, *Abstention: An Exercise in Federalism*, 108 U. PA. L. REV. 226, 228 n.19 (1959).

[12] *Cf.* Railroad Comm'n v. Pullman Co., 312 U.S. 496, 499-500 (1941).

[13] See generally Wright, *The Abstention Doctrine Reconsidered*, 37 TEXAS L. REV. 815 (1959); Note, *supra* note 11. A secondary problem which occasioned abstention was that the absence of state court review of federal determinations of unsettled questions of state law might encourage the use of the federal courts to circumvent certain state court interpretations of applicable state law.

[14] See Harrison v. NAACP, 360 U.S. 167, 178 (1959); Government & Civic Employees Organizing Comm. v. Windsor, 353 U.S. 364 (1957) (per curiam).

[15] See, *e.g.*, City of Meridian v. Southern Bell Tel. & Tel. Co., 358 U.S. 639 (1959) (per curiam); Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). The purpose of retention may be not only to decide a remaining constitutional question, but also to "guard against the possibility of an unforeseen bar to relief in the state courts," or unreasonable delay, HART & WECHSLER, *op. cit. supra* note 3, at 869 (1953), as well as to preserve the status quo during the pendency of the litigation. See Harrison v. NAACP, *supra* note 14, at 178-79.

[16] Burford v. Sun Oil Co., 319 U.S. 315 (1943); see Pennsylvania v. Williams, 294 U.S. 176 (1935).

[17] *Cf.* Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943).

[18] Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341 (1951).

[19] 360 U.S. 25 (1959).

could interpret the as yet unconstrued state eminent domain statute.[20] The Supreme Court upheld the district judge's exercise of discretion in this case in order to permit an authoritative exposition of an unconstrued state statute and to prevent possible disparity between the federal version of state law and that which would be later fashioned in state court.[21] This expansion of the abstention doctrine was a logical extension of the principle underlying *Erie* that federal courts must defer to state courts for the formulation of state law.

II. Objections to Abstention

However, several aspects of the abstention technique seriously undermine its efficacy. When a federal court abstains, the litigants bring a separate action, often for declaratory judgment,[22] in the appropriate state court, normally the state court of general jurisdiction. In effect, the case is transferred from a federal to a state trial court where the state law question and possibly, in a pendent jurisdiction case, the federal contention[23] are then presented. To the extent that the federal district judge and the state trial judge are similarly knowledgeable in state law, the transfer at that level is largely[24] superfluous. Since the ultimate purpose of abstention is to secure an authoritative determination of state law, the litigants must then proceed to the final appellate court through the required tiers of the state judiciary, unless that court has original jurisdiction over the particular case. Thus the litigants are subject to the cost and delay of separate suit in the state court system.[25] This delay may be magnified if the propriety of abstention was litigated in the federal system prior to the separate state action,[26] and is increased when the case returns to the federal

[20] City of Thibodaux v. Louisiana Power & Light Co., 153 F. Supp. 515 (E.D. La. 1957). *But cf.* County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959) (holding district court abstention improper in eminent domain diversity case). Compare Lutes v. United States Dist. Ct., 306 F.2d 948 (10th Cir. 1962). See Note, *supra* note 11, at 240-51.

[21] See Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 29-30 (1959); *cf.* Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500 (1941); First Nat'l Bank v. Reed, 306 F.2d 481, 487-89 (2d Cir. 1962).

[22] See, *e.g.*, Louisiana Power & Light Co. v. City of Thibodaux, *supra* note 21, at 30-31: "We assume that both parties will cooperate in taking prompt and effective steps to secure a declaratory judgment under the Louisiana Declaratory Judgment Act." *But see* note 25 *infra*.

[23] See cases cited note 14 *supra*. See also Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959).

[24] Except to the extent that the state judge acts knowing that he is subject to state court review on the question, whereas the federal judge knows he is not.

[25] Kurland, *Toward a Co-operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481, 489 (1960); Note, *Judicial Abstention From the Exercise of Federal Jurisdiction*, 59 Colum. L. Rev. 749, 779 & n.195 (1959). It may be two years and many dollars later before a decision is obtained from the state's highest court. Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 43 (1959) (Brennan, J., dissenting).

[26] See Harrison v. NAACP, 360 U.S. 167 (1959) (district court should have abstained on all questions of statutory construction); Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959) (district court decision to abstain affirmed prior to transfer of case to state court on abstention). The district court's staying order in an abstention case is not an appealable final decision under 28 U.S.C. § 1291 (1958), City of Thibodaux v. Louisiana Power & Light Co., 255 F.2d 774, 776 (5th

district court for final adjudication subject to further federal appellate review.[27]

If the federal district court abstains before the fact-finding process, the final state disposition of the state law question will be based on facts found by the state trial court.[28] Preferably, however, in order to eliminate state fact finding, the district court should explicitly retain any factual question for ultimate federal determination.[29] In a pendent jurisdiction case, if the state's highest court should also decide the federal question, appeal may be taken directly from that decision to the Supreme Court to cure unevenhanded application of the state law or improper decision of the federal question, or both;[30] but the Court's review of state court fact finding is restricted because of principles of comity and because an appellate court[31] must base any evaluation of trial court findings on a lifeless record.[32] In a pendent jurisdiction case, therefore, abstention may significantly impair the litigants' right to federal fact finding. In a diversity case, abstention in the form of district court dismissal may also deprive the litigant of impartial federal application of state law, since Supreme Court review of the issues typically posed in a diversity case may, upon equal protection challenge, only be available through the uncertain process of certiorari;[33] actually, when a serious danger of biased application is apparent, no form of abstention would be proper.[34]

But abstention affects interests other than those of the immediate litigants. The practice of abstention creates the risk that future litigants seeking relief under state law might be discouraged from invoking federal question jurisdiction to vindicate a federal right intertwined with a claim for state relief, or from utilizing diversity jurisdiction, because of the anticipation that by suing in the state courts where an appeal might not be prosecuted they could obtain speedier relief than by suing in a federal court

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Cir. 1958), *rev'd on other grounds*, 360 U.S. 25 (1959). But the court of appeals in *Thibodaux* determined with some difficulty that the district court's stay was an interlocutory order granting an injunction and was therefore appealable under 28 U.S.C. § 1292(1) (1958). The Supreme Court, obviously troubled by this interpretation, 360 U.S. at 26 n.1, eliminated this question from the scope of its review. Louisiana Power & Light Co. v. City of Thibodaux, 358 U.S. 893 (1958) (granting certiorari). See also Jackson Brewing Co. v. Clarke, 303 F.2d 844 (5th Cir. 1962).

[27] See the protracted *Spector* litigation from Spector Motor Serv., Inc. v. McLaughlin, 47 F. Supp. 671 (D. Conn. 1942) to Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602 (1951), cited in Note, 59 COLUM L. REV. 749, 779 n.195 (1959).

[28] When the district court is reversed by the Supreme Court for improperly refusing to abstain, the facts found by the district court pursuant to its initial determination of the entire case would probably not bind the state court after abstention.

[29] See Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 29 (1959) (dictum) (indicating that valuation will be finally determined by district court).

[30] Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959).

[31] See, *e.g.*, Reid v. Miles Constr. Corp., 307 F.2d 214, 218 (8th Cir. 1962), citing FED. R. CIV. P. 52(a).

[32] See Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 172-76 (1953). *Compare* U.S. CONST. art. III, § 2 *with* U.S. CONST. amend. VII.

[33] 28 U.S.C. § 1257(3) (1958).

[34] County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959) (*semble*).

that might abstain and subject them to the cost and delay of separate journeys through two judicial systems.[35]

III. Inter-Jurisdictional Certification

The technique of inter-jurisdictional certification is subject to none of these objections to abstention. Certification, in general, is a procedural device that enables a certifying court to secure an answer to a doubtful and difficult question of law arising in a case before it by presenting the question and its factual origins to an answering court which either is vested with a higher or final authority or possesses particular expertise.[36] When the certifying and answering courts are courts of the same state or are both federal, certification is intra-jurisdictional; the question is certified vertically to obtain an appellate answer. In inter-jurisdictional certification, the certifying courts are either courts of two different states or the certifying court is federal and the answering court is state;[37] the question is certified horizontally to settle an uncertain issue of state law. If instead of abstaining, a federal court can certify the state law question—in its factual setting and in the context of any constitutional objections—directly to the state's highest court and under an expedited procedure,[38] the litigants will be saved the time and expense of proceeding through the lower state court system, subject to trial and appellate court docket delays. Indeed, Mr. Justice Holmes referred to certification as "a mode of disposing of cases in the least cumbersome and most expeditious way."[39] In addition, the question will be framed in terms of facts found by the federal court, thereby preserving the quality of federal fact finding which the litigant sought in the alternative federal forum.

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[35] The cost and delay is further magnified in thirteen states with three-tiered judiciaries. See 14 Council of State Governments, The Book of the States 1962-1963, at 123 (1962).

[36] See Vestal, *supra* note 10, at 629-32.

[37] The phrase "inter-jurisdictional certification" might also describe certification from a state court to a federal court. Whereas certification from federal to state court is necessary in order to obtain state court review of a federal decision on state law in a particular case, state-federal certification is not essential since state court decision of a federal question may be reviewed by the United States Supreme Court.

[38] *Cf.* Speer v. State, 27 Ala. App. 579, 583-84, 177 So. 162, 166 (1937) (little delay from answer to judgment by certifying court); Georgia Power Co. v. Watts, 56 Ga. App. 322, 325, 192 S.E. 493, 496 (1937) (absent motion for rehearing, case returned ten days after answer); Iowa Code Ann. § 96.6(9) (1949) (questions certified from Iowa Employment Security Commission heard summarily by trial court in preference to all other civil cases save workmen's compensation); Tex. Sup. Ct. R. 477 (certified questions immediately sent to Supreme Court consultation room and either listed for argument or dismissed without hearing if improperly certified).

[39] Chicago, B. & Q. Ry. v. Williams, 214 U.S. 492, 495-96 (1909) (dissenting opinion). Certification is currently endorsed as a potential device for expeditiously and relatively inexpensively determining uncertain points of state law arising in cases brought in federal court. See Essex Universal Corp. v. Yates, 305 F.2d 572, 580 (2d Cir. 1962) (Friendly, J., concurring); Standard Acc. Ins. Co. v. New Amsterdam Cas. Co., 249 F.2d 847, 854 (7th Cir. 1957) (Finnegan, J., concurring); Kurland, *Mr. Justice Frankfurter, the Supreme Court and the Erie Doctrine in Diversity Cases*, 67 Yale L.J. 187, 214 (1957); Kurland, *supra* note 25, at 489-90; Vestal, *supra* note 10, at 645; Note, *Consequences of Abstention by a Federal Court*, 73 Harv. L. Rev. 1358, 1368 (1960).

Although intra-jurisdictional certification has a long history in both federal and state courts,[40] inter-jurisdictional certification has been used only once. In 1945, the Florida legislature authorized its supreme court to establish court rules permitting the United States Supreme Court or any federal court of appeals to certify unsettled questions of Florida law determinative of the case in which they arose.[41] The statute lay dormant

[40] Congress first authorized federal intra-jurisdictional certification in 1802, by permitting a circuit court to certify to the Supreme Court any question dividing its judges. 2 Stat. 159 (1802). In 1891, certification from the newly created circuit courts of appeals was allowed without requiring a division of opinion. 26 Stat. 828 (1891). But instead of answering the question posed in the certificate, the Supreme Court could then require the whole record and cause to be sent up for decision as if on error or appeal. The present statute authorizing certification from the courts of appeals is essentially the 1891 statute, *compare ibid. with* 28 U.S.C. § 1254(3) (1958), except that it permits certification from the Court of Claims, see 28 U.S.C. § 1255(2) (1958), with no provision, however, for Supreme Court discretion to decide the whole case prior to Court of Claims decision, because this would involve an unconstitutional exercise of the Supreme Court's original jurisdiction. Wheeler Lumber Bridge & Supply Co. v. United States, 281 U.S. 572, 576 (1930) (dictum). Otherwise, a long and steady practice under the regular certification statutes controls Court of Claims, see *id.* at 578, as well as court of appeals certification, since cases concerning the proper elements of a certificate decided under the 1802 statute remain precedent for post-1891 certification cases. See Graver v. Faurot, 162 U.S. 435, 437 (1896); Maynard v. Hecht, 151 U.S. 324, 326-27 (1894). See generally ROBERTSON & KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES § 135 (1951); Moore & Vestal, *Present and Potential Role of Certification in Federal Appellate Procedure*, 35 VA. L. REV. 1, 10-19 (1949). The current statute does not require division of opinion below; but since certification is most effective when used to obtain initial Supreme Court resolution of a question with no clearly controlling precedent, the answer probably must still be in doubt before a question is properly certified. See Columbus Watch Co. v. Robbins, 148 U.S. 266, 269-70 (1893); *cf.* Webster v. Cooper, 51 U.S. (10 How.) 54 (1850).

Various certification practices exist in seventeen states. See ALA. CODE ANN. tit. 13, §§ 88, 98 (1958); CONN. GEN. STAT. REV. § 52-235 (1958); FLA. STAT. ANN. § 59.42 (Supp. 1960); FLA. APP. R. 4.6; GA. CONST. art. 6, § 2-3704; GA. CODE ANN. §§ 24-4529, -4530 (1959); HAWAII REV. LAWS §§ 211-1, -2 (1955); IND. ANN. STAT. §§ 40-1512, -2108, -2220(f) (1952); IOWA CODE ANN. § 96.6(9) (1949); LA. REV. STAT. ANN. § 13:4449 (1951); LA. SUP. CT. R. 13.4; MASS. ANN. LAWS ch. 211, § 6, ch. 214, § 30, ch. 215, § 13 (1955); MINN. STAT. ANN. § 632.10 (1947); MINN. SUP. CT. R. 8; N.H. REV. STAT. ANN. §§ 490:9, 491:17, 547:30 (1955); N.Y. CONST. art. 6, § 7(4); N.Y. CIV. PRAC. ACT § 589; N.D. CENT. CODE §§ 32-24-01 to -04 (1960); R.I. GEN. LAWS ANN. §§ 9-24-26, -27 (1956); TEX. REV. CIV. STAT. ANN. art. 1729 (1945); TEX. SUP. CT. R. 477-79; TEX. CT. CIV. APP. R. 461-66; W. VA. CODE ANN. §§ 5344, 5769, 5788 (1961); W. VA. SUP. CT. APP. R. II(4)-(7); WYO. STAT. ANN. §§ 1-191 to -193 (1959). Connecticut has a procedure for reserving questions similar to certification which originally involved only voluntary, informal consultation. Sargent & Co. v. New Haven Steamboat Co., 65 Conn. 116, 128, 31 Atl. 543, 547 (1894). In 1855, however, a statute formalized the procedure and made the answer binding on the reserving court. *Ibid.*; Husted v. Mead, 58 Conn. 55, 66, 19 Atl. 233, 235 (1889). Hawaii's reservation procedure also has a long history, beginning with Hawaii Sess. Laws 1892, ch. 55, § 72. In 1903, Wyoming confined its reservation procedure to constitutional questions rather than to difficult and important questions generally. *Compare* Wyo. Sess. Laws 1903, ch. 72, § 1, *with* Wyo. Sess. Laws 1888, ch. 66, § 1.

Despite the long history of intra-jurisdictional certification in the federal and state courts, it has been little discussed. Vestal, *supra* note 10, at 629 & n.4. State intra-jurisdictional certification procedures generally provide that unsettled questions of law, dispositive of the case in which they arise, accompanied by a statement of relevant facts, necessary portions of the record, and briefs, may be specifically posed after lower court decision to the highest court of the state, which commonly has discretion whether to answer. Its response, once given, is binding on the certifying court and is usually accorded res judicata effect. Certification is customarily limited in scope and generally has not been frequently used. See note 76 *infra*.

[41] FLA. STAT. ANN. § 25.031 (1961).

until *Clay v. Sun Ins. Office, Ltd.*,[42] when Mr. Justice Frankfurter labelled it a product of "rare foresight" [43] and suggested that it be used. *Clay* was a diversity suit on an insurance contract, which plaintiff purchased in Illinois while an Illinois citizen, to recover for losses sustained in Florida after plaintiff had moved there. Defendant contended that a contractual time limitation, valid in Illinois but not in Florida, barred the suit. The Court of Appeals for the Fifth Circuit reversed a judgment for plaintiff on the ground that application of the Florida statute to extend the time limitation was a violation of due process.[44] The Supreme Court vacated this judgment and remanded the cause, holding that the constitutional issue should have been reached only if necessary after decision of two nonconstitutional questions of state law: whether the statute was applicable to the contract in question, and whether the losses sustained were covered by the policy's "all risks" clause.[45] Speaking for the majority, Mr. Justice Frankfurter indicated that these questions were unsettled and should be certified inter-jurisdictionally to the Florida Supreme Court for resolution.[46] Accordingly, the court of appeals certified the two questions to the Florida Supreme Court which amended its court rules to implement the certification statute,[47] upheld the statute,[48] and answered both certified questions in the affirmative.[49]

Thus, inter-jurisdictional certification, as illustrated by the *Clay* case, not only achieves the objectives of abstention—to prevent federal invasion of the state law-making function and to avoid needless federal-state friction—, but also represents a more perfect attempt at cooperative judicial federalism, since concern for state sovereignty is implemented through a more efficient and simpler proceeding. In addition, by abstaining, a federal court temporarily—if it has stayed the action—or permanently—if it has dismissed the action—severs itself from the case, leaving the state court to make an independent determination of at least the state law issue. Judicial cooperation exists only in the sense that a federal court has deferred to a state court. In inter-jurisdictional certification, however, the federal court actively participates in the resolution of the entire case by framing the state law question, specifying relevant facts and legal issues. and certifying directly to the state's highest court.

IV. Objections to Certification

However, certification must overcome two basic objections: that it induces abstract answers by severing legal questions from the facts which spawned them, and that it elicits advisory opinions from the answering

[42] 363 U.S. 207 (1960).
[43] *Id.* at 212.
[44] Sun Ins. Office, Ltd. v. Clay, 265 F.2d 522 (5th Cir. 1959).
[45] 363 U.S. at 209-10.
[46] *Id.* at 212.
[47] Fla. App. R. 4.61.
[48] Sun Ins. Office, Ltd. v. Clay, 133 So. 2d 735, 739-43 (Fla. 1961).
[49] *Id.* at 743.

courts. Inter-jurisdictional certification must satisfy both federal and state justiciability requirements.[50] The judicial function of an article III court is restricted to a "case" or "controversy," the antitheses of the abstract or advisory opinion. For a federal court to solicit a state court answer to an abstractly posed question and subsequently incorporate an advisory state court answer into its final adjudication of the rights of the parties would clearly violate the case or controversy principle. It is equally evident that the justiciable controversy requirements of most states will not permit a state court answer to an abstractly posed question or an answer that is merely advisory for state law purposes.[51] The constitutional problem which might be raised by federal solicitation and incorporation of abstract answers and the reluctance of the state court to answer an abstract certification can be obviated by an appropriate set of certification rules.[52]

A. Abstractness

An abstract question is defective because it is not stated in terms of concrete facts rooted in past acts.[53] A question without a specific focus tends to induce a generalized answer which often disregards hard and precise issues; without actual facts as guidelines, an answering court must try to prevision a near-infinity of possible fact complexes in order to formulate an accommodating rule. To avoid abstractness, therefore, the certifying federal court must pose the question in its detailed factual setting;[54] indeed, findings of fact should be an indispensable part of the

[50] For discussion of state justiciability requirements, see 40 TEXAS L. REV. 1041, 1044 (1962).

[51] *But cf.* Leiter Minerals, Inc. v. California Co., 241 La. 915, 132 So. 2d 845 (1961), 40 TEXAS L. REV. 1041 (1962).

[52] See Vestal, *The Certified Question of Law*, 36 IOWA L. REV. 629, 646 (1951). The problem of abstractness has been exaggerated far beyond its severity. Note, 16 U. MIAMI L. REV. 413, 431 (1962); Comment, 21 LA. L. REV. 777, 781-83 (1961).

[53] See HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 77-79 (1953).

[54] State intra-jurisdictional procedures are practically unanimous in their quest to eliminate abstractness. Only Alabama permits a certified question to be presented as an abstract proposition, ALA. CODE ANN. tit. 13, § 88 (1959), but questions are particularized by the record and briefs in the case. See Bolin v. State, 266 Ala. 256, 96 So. 2d 582 (1957); Sanders v. State, 260 Ala. 323, 70 So. 2d 802 (1954). Connecticut courts, influenced by the federal certification rules, have sought to avoid academic questions. See Barr v. First Taxing Dist., 147 Conn. 221, 223, 158 A.2d 740, 741 (1960); Hart v. Roberts, 80 Conn. 71, 74-75, 66 Atl. 1026, 1027 (1907). In Florida, the questions must be "definitely and concisely stated," and the certificate must contain a "style of the case" and a statement of facts. FLA. APP. R. 4.6. Georgia court rules were adopted verbatim from the federal certification rules, see Johnston v. Travelers Ins. Co., 183 Ga. 229, 188 S.E. 27 (1936), and thus seek to prevent abstract questions. The Supreme Court of Hawaii will not answer moot or abstract questions. Territory v. Aldridge, 35 Hawaii 565 (1940); E. E. Black, Ltd. v. Conkling, 33 Hawaii 278 (1935); see Cabrinha v. American Factors, Ltd., 42 Hawaii 96 (1957). Certified questions must be concrete. Sherman v. McClellan, 24 Hawaii 428 (1918); see In the Matter of Sherwood, 22 Hawaii 385, 389 (1914). The Louisiana Court of Appeals may certify "clear and concise" questions, LA. REV. STAT. § 13:4449 (1951), accompanied by findings of fact on which the questions are "predicated," LA. SUP. CT. R. 13(4). Questions may be reserved from trial courts in New Hampshire upon agreed statements of fact. N.H. REV. STAT. ANN. § 491-17 (1955). See also N.H. REV. STAT. ANN. § 490:9 (1955). But the facts need not be specifically stated if they can be found in the record. See Record v. Rochester

certificate.[55] In addition, as much of the record as is necessary for a complete understanding of the question should be included.[56] This selectivity of the facts and portions of the record to be contained in the certificate contributes to the expeditious nature of the certification technique.[57]

Occasionally a case may be too complex to be so divided that a question of law together with its surrounding facts and legal issues can stand alone as a judicially cognizable unit.[58] In such an indivisible case, rather than certifying a question that would necessarily be hypothetical because not presented in a context of related and necessary facts and issues of law, the federal court should send to the state court all legal questions, all findings of fact, and the entire record in order to guarantee a concrete setting of interrelated issues.[59]

The case or controversy principle also requires a genuinely adversary presentation of relevant issues in actual dispute,[60] on the theory that the clash of somewhat extreme positions will facilitate an objective solution through mutual correction. Thus, to prevent abstractness the question should be briefed and argued before the answering court.[61]

Basically, these proposed inter-jurisdictional rules would parallel the technical requirements which have been rigidly enforced by the Su-

Trust Co., 89 N.H. 1, 10, 192 Atl. 177, 183 (1937). When certification existed in New Jersey, questions had to be framed by concrete cases. Schreiner v. Grinnell, 89 N.J.L. 37, 97 Atl. 781 (Sup. Ct. 1916). The New York Court of Appeals will never answer an academic question. Jackson v. National Grange Mut. Liab. Co., 299 N.Y. 333, 87 N.E.2d 283 (1949). Only nonabstract questions can be certified in Texas. Galveston, H. & S.A. Ry. v. Zantzinger, 92 Tex. 365, 48 S.W. 563 (1898); see Gillespie v. Fuller Constr. Co., 122 Tex. 506, 61 S.W.2d 977 (1933).

[55] *Cf.* Cutler's Appeal, 74 Conn. 35, 36, 49 Atl. 338 (1901); LA. SUP. CT. R. 13(4).

[56] *Cf.* Bolin v. State, 266 Ala. 256, 96 So. 2d 582 (1957); Sanders v. State, 260 Ala. 323, 70 So. 2d 802 (1954); FLA. APP. R. 4.6; GA. CODE ANN. § 24-4529 (1959); Hodges v. Seabord Loan & Sav. Ass'n, 188 Ga. 410, 412, 3 S.E.2d 677, 678 (1939) (dictum); LA. REV. STAT. § 13:4449 (1951); MINN. SUP. CT. R. 8; N.D. CENT. CODE § 32-24-03 (1960); TEX. CT. CIV. APP. R. 466; W. VA. CODE ch. 58, art. 5, § 2 (1962).

[57] Clearly, only uncertain questions should be certified in order to ensure that inter-jurisdictional certification is utilized only when necessary, thereby preserving its expeditious nature; *cf.* ALA. CODE ANN. tit. 13, § 88 (1959) (there must be a division of opinion of the judges of the court of appeals); FLA. APP. R. 4.6(a); Chapman v. Slaff, 101 So. 2d 413 (Fla. Dist. Ct. App. 1958) (per curiam); Territory v. Scully, 22 Hawaii 484 (1915) (lower court must have "well-founded doubts" about the answer); Phillips v. Soule, 88 Mass. (6 Allen) 150 (1863) (grave or doubtful questions); N.D. CENT. CODE § 32-24-04 (1960); see also N.D. CENT. CODE § 32-24-01 (1960). The answer probably must be doubtful to justify federal intra-jurisdictional certification. See note 40 *supra*.

[58] *Cf.* FLA. APP. R. 4.6. (intra-jurisdictional questions must be answerable "without regard to other issues" in the case).

[59] See note 56 *supra*.

[60] *Cf.* HART & WECHSLER, *op. cit. supra* note 53, at 77.

[61] *Cf.* Bolin v. State, 266 Ala. 256, 96 So. 2d 582 (1957); Sanders v. State, 260 Ala. 323, 70 So. 2d 802 (1954) (briefs); FLA. APP. R. 4.6 (briefs and oral argument); Liverpool & London & Globe Ins. Co. v. Stuart, 193 Ga. 437, 18 S.E.2d 681 (1942) (briefs); Territory v. Uluihi, 28 Hawaii 156 (1925) (per curiam) (briefs); Opinion to Governor, 88 R.I. 392, 149 A.2d 341 (1959) (by implication) (briefs and oral argument); TEX. CT. CIV. APP. R. 466; TEX. SUP. CT. R. 477; White v. Board of County Comm'rs, 77 Wyo. 246, 313 P.2d 484 (1957) (by implication) (oral argument).

preme Court to prevent federal intra-jurisdictional certification of abstract questions.[62] The federal intra-jurisdictional certificate must state its questions clearly and distinctly [63] so that the Court need not labor to find a definite question.[64] Each insulated legal question must be presented in a particularized factual setting,[65] and the certificate must disclose all pertinent facts so that the questions are not affected by "unstated matter lurking in the record." [66] Questions of "objectionable generality" are dismissed.[67] Further, a certificate is defective if the question as posed can consistently receive different answers.[68] To secure the important adversary context of the actual case, the certified questions are briefed and argued.[69]

Although these technical requirements were essential to guard against abstractness in order to enforce the federal constitutional case or controversy requirement, the Supreme Court has properly applied them far more

[62] The Supreme Court will answer an intra-jurisdictional certificate only when satisfied that it presents an actual issue in the case involving a federal question sufficiently substantial to justify Court review on appeal. See United States v. Rice, 327 U.S. 742 (1946); Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942); Wheeler Lumber Bridge & Supply Co. v. United States, 281 U.S. 572 (1930); News Syndicate Co. v. New York Cent. R.R., 275 U.S. 179 (1927); United States v. Mayer, 235 U.S. 55 (1914); McHenry v. Alford, 168 U.S. 651 (1898); United States v. Hall, 131 U.S. 50 (1889); United States v. Northway, 120 U.S. 327 (1887); United States v. Briggs, 46 U.S. (5 How.) 208 (1847). See also HART & WECHSLER, *op. cit. supra* note 53, at 571-76 (1953).

[63] McHenry v. Alford, 168 U.S. 651, 659 (1898); United States v. Briggs, *supra* note 62.

[64] United States v. Union Pac. Ry., 168 U.S. 505, 512 (1897); United States v. Perrin, 131 U.S. 55, 57 (1889); United States v. Hall, 131 U.S. 50, 52 (1889); Dublin Township v. Milford Sav. Institution, 128 U.S. 510, 513-14 (1888).

[65] NLRB v. White Swan Co., 313 U.S. 23, 27 (1941).

[66] Atlas Life Ins. Co. v. W. I. Southern, Inc., 306 U.S. 563, 573 (1939).

[67] NLRB v. White Swan Co., 313 U.S. 23, 27 (1941).

[68] See Atlas Life Ins. Co. v. W. I. Southern, Inc., 306 U.S. 563, 573 (1939); Lowden v. Northwestern Nat'l Bank & Trust Co., 298 U.S. 160, 162 (1936); Triplett v. Lowell, 297 U.S. 638, 648 (1936).

[69] See SUP. CT. R. 29.

Moreover, due to the appellate nature of certification, the questions must necessarily be purely legal and not factual, Jewell v. Knight, 123 U.S. 426, 434 (1887); City of Waterville v. Van Slyke, 116 U.S. 699, 701 (1886); SUP. CT. R. 28(1), or a mixture of law and fact, Chicago, B. & Q. Ry. v. Williams, 205 U.S. 444, 453 (1907). And the factual statement accompanying the certified question must contain ultimate facts only, leaving just a conclusion of law to be drawn. See Jewell v. Knight, *supra* at 434. The Court bases its answer on the facts found in the certificate. See SUP. CT. R. 29(1). It neither infers further facts, weighs the evidence, see Fire Ins. Ass'n v. Wickham, 128 U.S. 426, 434 (1888), nor uses the record unless it has called up the whole case. See Cincinnati, H. & D.R.R. v. McKeen, 149 U.S. 259, 261 (1893). If the question involves an issue that may not ultimately require decision in order to dispose of the case, the Court will not risk answering an academic question. See Busby v. Electric Util. Union, 323 U.S. 72, 74-75 (1944). On the other hand, because a case turns on the question certified does not mean that the whole case has been certified; thus, a question is not disallowed because its answer may decide the controversy. Indeed, the importance or controlling character of the question is the best reason for its certification, Chicago, B. & Q. Ry. v. Williams, 214 U.S. 492, 496 (1909) (Holmes, J., dissenting), and its answer must always aid in the lower court's determination of the case. United States v. Mayer, 235 U.S. 55, 66 (1914). Although more than one point may be certified, the questions must not add up to the whole case. See United States v. Hall, 131 U.S. 50, 52 (1889). Under the present statute, transfer of the entire case to the Supreme Court can occur only on the Court's own initiative. 28 U.S.C. § 1254(3) (1958); SUP. CT. R. 28(2).

strictly [70] than the Constitution demands for two reasons: to provide a framework for practical operation within the general phraseology of the federal intra-jurisdictional certification statute; [71] and to maintain control over its docket by limiting the number of questions that the courts of appeals or Court of Claims could present within the Court's obligatory certification jurisdiction [72]—as opposed to the discretionary certiorari procedure—,[73] since the Court would otherwise be able to refuse these certificates only for want of a substantial federal question.[74] Therefore, the Supreme Court's underlying attitude of answering only when absolutely necessary [75] should not be transplanted into the inter-jurisdictional context as precedent for either the certifying federal court or the answering state court to narrow the scope of certification. Nor should the state court's willingness to answer be affected by any reluctance it may have evidenced to respond to intra-jurisdictional state certificates.[76] For in intra-jurisdictional certification, the answering court is an appellate court with revisory and supervisory powers over the certifying court; in order to ensure a correct decision it can review the entire case after it is finally determined below. Because of the answering court's ultimate dominion

[70] See note 62 *supra.*

[71] 28 U.S.C. § 1254(3) (1958): "By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired . . . ."

[72] *Ibid.*

[73] 28 U.S.C. § 1254(1) (1958).

[74] See note 62 *supra.*

[75] Since intra-jurisdictional certification invokes an exceptional aspect, Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam), of the Supreme Court's appellate jurisdiction, United States v. Rice, 327 U.S. 742, 747 (1946), it has been sparingly used. Before 1950, there were approximately two certification cases per year, Moore & Vestal, *Present and Potential Role of Certification in Federal Appellate Procedure*, 35 VA. L. REV. 1, 10-19 (1949); since then probably fewer have arisen. See note 62 *supra.*

[76] See Stark v. Malcom, 38 So. 2d 469 (Fla. Sup. Ct. 1949); Schwob Co. v. Florida Industrial Comm'n, 152 Fla. 203, 11 So. 2d 782 (1942) (dictum); McGuckin v. Dade County, 121 So. 2d 63, 64 (Fla. Dist. Ct. App. 1960) (per curiam); *In re* Aron's Estate, 118 So. 2d 546 (Fla. Dist. Ct. App. 1960) (dictum); Clar v. Dade County, 116 So. 2d 34 (Fla. Dist. Ct. App. 1959) (dictum); Davies v. Davies, 113 So. 2d 250 (Fla. Dist. Ct. App. 1959) (dictum) (scope of certification strictly construed). Rumsey v. New York Life Ins. Co., 23 Hawaii 142 (1916) (used conservatively to avoid piecemeal trials). The Wyoming Supreme Court, although originally supporting reservation because it saved time and expense, State v. Crocker, 5 Wyo. 385, 40 Pac. 681 (1895), has now condemned it as a hindrance to speedy disposition. White v. Board of County Comm'rs, 77 Wyo. 246, 256, 313 P.2d 484, 488 (1957).

However, several states have liberally employed certification. The Alabama Supreme Court readily answers. See Johnson v. State, 269 Ala. 1, 111 So. 2d 610 (1958); Bolin v. State, 266 Ala. 256, 96 So. 2d 582 (1957); Smith v. State, 263 Ala. 1, 82 So. 2d 296 (1955); Sanders v. State, 260 Ala. 323, 70 So. 2d 802 (1954). A substantial number of reported certification cases indicates that Minnesota's procedure, which is limited to criminal cases, Newton v. Minneapolis St. Ry., 186 Minn. 437, 240 N.W. 470 (1932) (per curiam); see MINN. STAT. ANN. § 632.10 (1947), is often used. In New Hampshire, certification is also commonly employed and even considered "well adapted to effectuate the speedy and final determination of the validity of legislation." Musgrove v. Parker, 84 N.H. 550, 551, 153 Atl. 320, 321 (1931) (dictum). The Wyoming Supreme Court recently answered eleven related certified questions in one case. Miller v. Board of County Comm'rs, 79 Wyo. 502, 337 P.2d 262 (1959).

over the case, certification provides merely a preliminary contact with the cause, and an intra-jurisdictional answering court can decline to answer without serious misgivings. In inter-jurisdictional certification, however, the answering court has no control over the certifying court other than its power to answer the certified questions; certification is usually the only decisional channel through which the answering court will have direct contact with the case. Thus, the inter-jurisdictional answering court should more readily respond to the question posed by the federal certificate, regardless of its own or federal intra-jurisdictional precedents.[77]

B. Advisory Opinion

Although abstractness can be eliminated by an appropriately framed certificate and by an adversary presentation of the case, if resolution of the certified question is not necessary to the disposition of the case, the answer is merely advisory. An advisory answer lacks the responsiveness and responsibility to particular litigants that inheres in an answer which, being essential to the disposition of a case, directly affects the parties' rights.[78] An answer that binds the specific parties and is res judicata as to their state rights should also be accorded stare decisis effect in all future indistinguishable cases so that decisional rules of law will be applied evenhandedly. The sobering fact that a decision determines both present and future rights ensures more responsible examination of issues and more scrupulous balancing of competing considerations. Therefore, to maximize the probability of correct answers, inter-jurisdictional certification should be restricted to questions necessary to disposition of the case.[79]

In intra-jurisdictional certification, many states require a lower court ruling before the question can be certified to the state's highest court.[80]

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[77] Florida, the inter-jurisdictional pioneer, has been restrictive in its intra-jurisdictional practice. See Florida cases cited note 76 *supra.*

[78] HART & WECHSLER, *op. cit. supra* note 53, at 78-79.

[79] *Cf.* Barr v. First Taxing Dist., 147 Conn. 221, 158 A.2d 740 (1960); Hart v. Roberts, 80 Conn. 71, 74, 66 Atl. 1026, 1027 (1907) ("quite certain" to enter into disposition of the case); FLA. APP. R. 4.6(a); Chapman v. Slaff, 101 So. 2d 413 (Fla. Dist. Ct. App. 1958) (per curiam) (determinative); GA. CODE ANN. § 24-4530 (1959); Queen v. Poor, 9 Hawaii 218, 220 (1893) (probably "decisive of the case"); Phillips v. Soule, 88 Mass. (6 Allen) 150 (1863) ("expedient or necessary for the final disposition"); Fortin v. Sullivan, 96 N.H. 320, 321, 75 A.2d 785, 786 (1950) (per curiam) (would be "of no assistance" to the lower court); N.Y. CIV. PRAC. ACT § 589; City Bank Farmers Trust Co. v. Cohen, 300 N.Y. 361, 91 N.E.2d 57 (1950); Langan v. First Trust & Deposit Co., 296 N.Y. 60, 70 N.E.2d 15 (1946) (per curiam) ("decisive of the correctness of the order appealed from"); N.D. CENT. CODE § 32-24-04 (1960) ("principally determinative of the issues in the case"); Poirier v. Quinn, 83 R.I. 98, 113 A.2d 642 (1955) ("so affects the merits" that immediate decision is needed); Kelley-Goodfellow Shoe Co. v. Liberty Ins. Co., 87 Tex. 112, 26 S.W. 1063 (1894) ("essential to the decision"); State v. Houchins, 96 W. Va. 375, 377, 123 S.E. 185, 186 (1924) (dictum) (of "vital importance . . . [to] final disposition").

[80] See HAWAII REV. LAWS § 211-2 (1955) (question may be returned for initial decision below); State v. Wellman, 143 Minn. 488, 173 N.W. 574 (1919) (per curiam); State v. Byrud, 23 Minn. 29 (1876); N.D. CENT. CODE § 32-24-04 (1960); TEX. CT. CIV. APP. R. 466 (tentative decision below); W. VA. SUP. CT. APP. R. II(4); County Court v. Cottle, 82 W. Va. 743, 97 S.E. 292 (1918); State v. Houchins, 96 W. Va. 375, 123 S.E. 185 (1924) (dictum). *But cf.* Manchester Amusement Co.

This not only reveals whether or not the answer sought will enter into the final disposition of the case, but also ensures that the prerequisites to the proper invocation of the state court's appellate jurisdiction will be satisfied.

1. Satisfying State Justiciability Requirements

Before it can answer a certified question, a state appellate court must be convinced that its state justiciability requirements will not be offended. Although certain states might permit a purely advisory answer,[81] the majority of states would probably respond only if their answer would be sufficiently nonadvisory to qualify as a res judicata and stare decisis adjudication of the state rights involved.[82] Clearly, then, decision on certification is basically dissimilar to the normal advisory opinions rendered to a legislature, governor, or state council by courts in eleven states in response to questions of law that neither arise from actual litigation nor involve private rights.[83] These consultatory opinions are not legally binding although they are invariably accepted by the requesting governmental unit and are frequently cited as authority in later cases.[84] In some states, they are not institutional determinations;[85] they are, in fact, sparingly rendered.[86] Although briefs may be submitted, there is usually no oral

v. Conn., 80 N.H. 455, 461, 119 Atl. 69, 73 (1922); N.H. JUDICIAL COUNCIL, FOURTH REPORT 32-34 (1952) (important questions may be reserved prior to trial court ruling); Stutsman County v. Dakota Trust Co., 45 N.D. 451, 178 N.W. 725 (1920). Spaulding v. Martin, 66 R.I. 367, 19 A.2d 305 (1941) (permitted prior to trial); Morrow v. Corbin, 122 Tex. 553, 62 S.W.2d 641 (1933) (appellate function limits supreme court to deciding questions only after decision below); State v. Crocker, 5 Wyo. 385, 40 Pac. 681 (1895) (state constitution does not require decision below). *But see* White v. Board of County Comm'rs, 77 Wyo. 246, 313 P.2d 484 (1957); State *ex rel.* Fawcett v. Board of County Comm'rs, 73 Wyo. 69, 273 P.2d 188 (1954) (questions of statutory construction must be first determined by Wyoming trial court).

[81] Eleven states permit advisory opinions of some sort. See note 83 *infra* and accompanying text.

[82] Most state intra-jurisdictional procedures accord some sort of binding effect to the answer. See ALA. CODE ANN. tit. 13, § 88 (1958); Lashley v. State, 28 Ala. App. 86, 90, 180 So. 720, 723 (1938) (most probably res judicata and stare decisis); Tyler v. Hammersley, 44 Conn. 393, 414-15 (1877); New Haven & Northampton Co. v. State, 44 Conn. 376, 391-92 (1877) (res judicata just as though originally rendered by reserving court and affirmed by the answering court); Nichols v. City of Bridgeport, 27 Conn. 459, 462 (1858) (dictum) (res judicata effect but precedential value unclear). *But see* Sargent & Co. v. New Haven Steamboat Co., 65 Conn. 116, 127-28, 31 Atl. 543, 547 (1894). See Liverpool & London & Globe Ins. Co. v. Stuart, 191 Ga. 745, 14 S.E.2d 98 (1941) (binding on certifying court insofar as applicable); LA. REV. STAT. ANN. § 13:4449 (1951) (binding on certifying court); Pipes v. Gallman, 174 La. 257, 140 So. 40 (1932) (res judicata on review unless additional facts appear that were not stated on certification); Stutsman County v. Dakota Trust Co., 45 N.D. 451, 178 N.W. 725 (1920) (res judicata); Opinion to Governor, 88 R.I. 392, 149 A.2d 341 (1959) (suggesting that decision on certification has the force of law); *cf.* Rosenbledt v. Wodehouse, 25 Hawaii 561 (1920) (answer not binding on supreme court when reviewing entire case on writ of error). See also Vestal, *supra* note 52, at 636.

[83] The usual advisory opinion is described in Stevens, *Advisory Opinions—Present Status and an Evaluation*, 34 WASH. L. REV. 1 (1959).

[84] HART & WECHSLER, *op. cit. supra* note 53, at 80-81; Stevens, *supra* note 83, at 6-7.

[85] See Field, *The Advisory Opinion—An Analysis*, 24 IND. L.J. 203, 214 (1949).

[86] Stevens, *supra* note 83, at 11.

argument.[87] In inter-jurisdictional certification, however, the answer is responsive to a question which was presented in actual litigation and presumably was posed nonabstractly by a federal court bound to solicit an answer in accordance with a standard at least as stringent as the state's own justiciability requirement. Most significantly, that answer will determine the rights of federal court parties, will have res judicata and stare decisis effect, and will authoritatively settle state law on the question. Therefore, when a federal court has chosen to defer to the state court and has initiated a chain of cooperation by certifying the state law question, the state court should normally not hesitate to answer in order to make cooperative federalism a practical reality.

2. Satisfying the Federal Constitutional Requirement

The ultimate step in inter-jurisdictional certification is the incorporation of the state answer by the federal certifying court into its final determination of the parties' rights. If the state answer is presented as an advisory opinion—without res judicata or stare decisis effect—by a state court empowered to issue such decisions, its federal incorporation would raise serious constitutional objections, since federal litigants' rights would then effectively be decided by a state tribunal unrestrained by the responsibility of formulating precedential state law. In any event, since an advisory opinion is somewhat unresponsive to the actual litigants and irresponsible to similar future litigants if it has no res judicata or stare decisis effect, the federal court should probably reject an advisory answer as an unreliable exposition of state law, and either recertify the question, requesting a binding precedential determination, or decide the state law question itself. However, should the state court answer be a final adjudication of the federal litigants' state rights to be accorded stare decisis effect by the state judiciary, incorporation by the federal court would not violate the federal case or controversy requirement, just as incorporation of a binding state court opinion secured after federal court abstention is evidently consonant with the federal requirement.[88]

V. Implementing Inter-Jurisdictional Certification

A. Solely Federal Authorization

Several alternative patterns of authorization are conceivable to implement inter-jurisdictional certification. A federal statute [89] might be enacted enabling federal court litigants in an abstention situation to petition for issuance to the appropriate state court of a certificate requesting an answer to an unsettled question of state law. It is unlikely, however, that Congress could compel state answer, especially if the state court objected on the

[87] Field, *supra* note 85, at 214.

[88] *But cf.* 40 Texas L. Rev. 1041 (1962).

[89] See Kurland, *Mr. Justice Frankfurter, the Supreme Court and the Erie Doctrine in Diversity Cases*, 67 Yale L.J. 187, 214 (1957). *Cf.* Testa v. Katt, 330 U.S. 386 (1947). See generally Hart & Wechsler, *op. cit. supra* note 53, at 395-99.

ground that it was not otherwise competent[90] since it had no intrastate certification procedure. Congress could perhaps compel a state with intra-jurisdictional certification to answer on the theory that it is "necessary and proper for carrying into execution" the federal judicial power,[91] but such compulsion is hardly conducive to cooperative judicial federalism which certification should foster.

Certification might also be implemented through federal court initiative alone. It has been suggested that a federal equity court has inherent power to certify to state courts,[92] although it is doubtful that it can compel an answer. Nevertheless, a state's willingness to answer might be evidenced by its response in a somewhat analogous situation. Cases on review in the Supreme Court in which the basis of state court decision below was sufficiently ambiguous to render uncertain the existence of an adequate and independent nonfederal ground have been retained in the Court pending application to the state court for a certificate to remove the ambiguity;[93] state courts have usually responded by clarifying or amending their original opinion. Of course, this procedure to clarify the basis of a state court's decision in a case which originated in that state court, is distinguishable from inter-jurisdictional certification which involves the transfer of a discrete part of a case originally brought in federal court to a state court which has no past contact with the case. Thus it is difficult to predict the states' reaction to inter-jurisdictional questions certified under inherent federal equity power.

B. The Need for State Authorization

Since inter-jurisdictional certification is an expeditious and efficient procedure designed to accelerate cooperation between federal and state judiciaries, it ideally should be implemented by coordinate action, without any need for federal compulsion of state answer.[94] The answering state court should function under statutory authorization or court rules, or both, intended to facilitate and promote the reception of federal court certificates. In addition, the federal courts should be provided with a clarifying federal statute and should promulgate detailed court rules which complement appropriate state requirements for certification. Yet the *Clay* case demonstrates that state authorization alone—by statute and court rule—is sufficient to implement inter-jurisdictional certification, and that the Supreme Court has recognized the value of certification to the federal judiciary and has authorized its use by the courts of appeals when appropriate state pro-

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[90] *Cf.* Douglas v. New York, N.H. & H.R.R., 279 U.S. 377, 387-88 (1929).

[91] U.S. CONST. art. I, § 8, cl. 18.

[92] Note, *Consequences of Abstention by a Federal Court*, 73 HARV. L. REV. 1358, 1368 (1960).

[93] See Herb v. Pitcairn, 324 U.S. 117 (1945). See generally HART & WECHSLER, *op. cit. supra* note 53, at 443-47; Wolfson & Kurland, *Certificates by State Courts of the Existence of a Federal Question*, 63 HARV. L. REV. 111 (1949); Note, 62 COLUM. L. REV. 822 (1962).

[94] See Kurland, *Toward a Co-operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481, 490 (1960).

cedures exist.[95] The onus of implementation, therefore, whether through statute or court rule, or both, now rests upon the states, although federal initiative in authorizing inter-jurisdictional certification might accelerate state adoption. Theoretically, sufficient incentive for state implementation should be provided by the fact that respect for state sovereignty is the underlying concern of inter-jurisdictional certification.

C. Discretion in the Federal Certifying Court

In situations in which federal courts would otherwise abstain, the objectives of certification will be better served by discretionary, rather than mandatory, certification procedures. For example, in certain pendent jurisdiction cases so complex that in order to avoid abstractness the certifying court must include all the questions in the case, certification may be inappropriate because inclusion of the federal question may constitute an abdication of the federal judicial function. However, by virtue of the ultimate federal dominion over the cause, this objection may be minimized in specific instances. The federal court may be able to forestall state court decision of the federal issue by instructing the state court to consider the federal question only as providing a context for decision of the state question.[96] Or should the state court proceed to determine the federal question, the federal court could either disregard the state answer and adopt only the state law determination, or reject the entire answer upon finding that the state court decision of the state issue was so related to an incorrect federal question decision that it no longer represented a valid exposition of state law. In the highly unlikely[97] event that appeal of the state court decision could be taken directly to the Supreme Court,[98] the absence of lower federal court determination of the federal question would not prejudice the litigants since they would then receive the most authoritative adjudication of their federal rights.

In a diversity case, even though a federal court instruction might not be able to prevent or persuade a state court from deciding all state law questions, certification of all the issues would not constitute an abdication since diversity jurisdiction is intended to create only an alternative forum to ensure evenhanded application of state law and unbiased fact finding—by definition not involved in certification since the certificate establishes the factual situation—, rather than to provide a means of avoiding state court interpretation of state law. And, in the event of biased state application, the federal court could always re-apply the state law as the state court has

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[95] Clay v. Sun Ins. Office, Ltd., 363 U.S. 207, 211-12 (1960).

[96] *Cf.* Government & Civic Employees Organizing Comm. v. Windsor, 353 U.S. 364 (1957) (per curiam).

[97] Access to Supreme Court review through appeal or certiorari would depend on whether state answers constitute "final judgments or decrees" within the meaning of 28 U.S.C. § 1257 (1958). *Cf.* Government & Civic Employees Organizing Comm. v. Windsor, 353 U.S. 364 (1957) (per curiam). See generally, HART & WECHSLER, *op. cit. supra* note 53, at 545-57.

[98] See 28 U.S.C. § 1257(2) (1958).

articulated it, or, if necessary, reject the entire state court answer and decide the whole case itself. In light of these possibilities, the federal certifying court must clearly be given discretion to determine the appropriateness of certification [99] by evaluating the subtle and essentially unpredictable factors in each particular case.[100]

D. Discretion in the State Answering Court

Nor should certification invoke the obligatory jurisdiction of the state answering court.[101] After it has requested and examined the full record, that court may be unable to answer because the question as posed is hypothetical under state justiciability requirements. Even if the certificate satisfies these state requirements, the record may indicate that the question is one which the state court for various reasons is not yet prepared to answer [102] or which would entail only discretionary review if appealed in the state court system; merely because the state court now receives the question in the form of a federal court certificate does not justify invasion of basic state court prerogative. Indeed, a state provision for compulsory answer would not comport with the cooperative aspect of cooperative judicial federalism. Therefore, inter-jurisdictional certification should be entrusted to the sound discretion of both the federal certifying court and the state answering court.

E. Federal District Court Certification

Although abstention occurs at the district court level, it does not necessarily follow that the federal district courts should be able to initiate inter-jurisdictional certification. Some states' intra-jurisdictional procedures foreclose certification from trial courts or require a prior trial court ruling on the question to avoid an unconstitutional exercise of appellate jurisdiction by the state's highest court,[103] to ensure that the question is actually essential to determination of the case, and to aid the certifying court in drafting a nonabstract certificate.[104] If the district court certification is

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[99] *Cf.* Vestal, *supra* note 52, at 633.

[100] *Cf.* ALA. CODE ANN. tit. 13, § 88 (1958); FLA. APP. R. 4.6; Queen v. Poor, 9 Hawaii 218, 220 (1893); IOWA CODE ANN. § 96.6(9) (1949); LA. REV. STAT. ANN. § 13:4449 (1951); N.D. CENT. CODE § 32-24-04 (1960). *But cf.* ALA. CODE ANN. tit. 13, § 98 (1958); State v. Homan, 38 Ala. App. 642, 645, 92 So. 2d 51, 53 (1957) (dictum) (certification required if court of appeals intends to invalidate statute).

[101] *Cf.* Barr v. First Taxing Dist., 147 Conn. 221, 223, 158 A.2d 740, 741 (1960); Hart v. Roberts, 80 Conn. 71, 75, 66 Atl. 1026, 1027 (1907) (in the interest of "simplicity, directness and economy of judicial action"); Queen v. Poor, 9 Hawaii 218, 220 (1893); LA. REV. STAT. ANN. § 13:4449 (1951); N.D. CENT. CODE § 32-24-02 (1960); W. VA. CODE ANN. § 5788 (1961). *But cf.* Johnston v. Travelers Ins. Co., 183 Ga. 229, 232, 188 S.E. 27, 28 (1936) (supreme court must answer if certificate accords with technical court rules). Moore & Vestal, *Present and Potential Role of Certification in Federal Appellate Procedure*, 35 VA. L. REV. 1, 43 (1949).

[102] The question may not be "ripe," see Vestal, *supra* note 52, at 635, or it may be a political "hot potato" that the court does not wish to pick up.

[103] See note 80 *supra* and accompanying text.

[104] *E.g.*, Stutsman County v. Dakota Trust Co., 45 N.D. 451, 178 N.W. 725 (1920).

to be accepted by those states permitting trial court certification, therefore, it should at least be limited to questions first decided by the district courts. But the basic reasons for the abstention doctrine as now developed do not require certification at this level. Abstention is intended in part to prevent federal decision of unsettled state law when there is no opportunity for state court review. Since a district court judge is usually a member of the bar of the state in which he sits and presumably possesses an adequate knowledge of that state's law, he is as able as a state trial court judge to make a calculated guess as to the probable state supreme court decision of the unsettled question. And, with certification by the court of appeals a possibility, the district court judge, like his state counterpart, would be operating under the knowledge that his decision on state law might be subject to review by the highest state court. Consequently, any added delay at this level, even through the expeditious certification technique, imposes an unnecessary burden on the litigants.

In addition, limiting certification to the courts of appeals removes the risk—inherent in abstention and involved to a lesser degree should district courts be permitted to certify—that prospective litigants with state claims might be discouraged from invoking federal question or diversity jurisdiction because they believed that they could obtain speedier relief in state court. Furthermore, if certification is permitted only after a case has been appealed, the more regionally composed court of appeals, less conversant with a particular state's law, can use the district court opinion to determine more accurately whether the state law question is so unsettled that certification is required; to make certain that the question is necessary to disposition of the case; and to assist the formulation of a nonabstract certificate which takes interrelated issues into consideration. Also, certification only from courts of appeals eliminates the delay involved in abstention when the case must first return to the district court. Finally, although a state may be willing to expand its judicial workload to encompass certified questions from federal appellate courts, it may consider certification from the numerous federal district courts an unnecessary burden should certification become an accepted technique. Thus, the Florida statute and court rule relied on in the *Clay* case effectively limit the number of cases that may be certified to the Florida Supreme Court by providing for only court of appeals and Supreme Court certification.[105]

F. Three-Judge District Court Certification

Use of the inter-jurisdictional certification technique by three-judge district courts has also been suggested.[106] Unlike the regular district courts, the three-judge tribunals include one court of appeals judge and one district

[105] See FLA. STAT. ANN. § 25.031 (1961); FLA. APP. R. 4.61.

[106] Kurland, *Toward a Co-operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481, 490 n.44 (1960).

judge who may not normally sit in the state whose law is to be applied; accordingly, state decision of an unsettled state law question seems more appropriate at the three-judge level. Moreover, since three-judge courts have jurisdiction over suits brought to enjoin enforcement of state statutes,[107] they have a particular interest in obtaining a definitive resolution of unsettled questions of state law; and since their jurisdiction is limited, they are not so often convened that they could certify a burdensome number of questions. Indeed, leading abstention cases involving pendent jurisdiction have originated in three-judge district courts.[108] However, to conform to the appellate requirements of some states, to clarify the dispositive nature of the question, and perhaps to aid in drafting a nonabstract certificate, certification should be limited to those state questions already decided by the three-judge court. Most decisively, three-judge district court certification is necessary since there will be no opportunity in the case for a court of appeals to certify—three-judge determinations are only appealable to the Supreme Court;[109] and although the Supreme Court could certify, the process of determining whether to certify and framing the certificate in all such three-judge abstention cases imposes an unwarranted burden on the Supreme Court in light of the reasonable alternative of permitting certification directly from the three-judge courts.

VI. Conclusion

Inter-jurisdictional certification from courts of appeals and three-judge district courts will better attain the objectives of abstention while curing its defects. Therefore, abstention should not be available to district courts in those states that adopt appropriate procedures for the reception and nonadvisory answer of federally certified questions. However, the scope of certification probably should not be governed by the extremely hazy standard that determines when abstention is appropriate or acceptable. Accordingly, although inter-jurisdictional certification is proposed to replace federal court abstention, it may ultimately be broadly applicable to diversity[110] and pendent jurisdiction cases in which pertinent state law is unsettled because either no decisions are on point or the decisions are in conflict. Such certification would further the *Erie* principle that federal courts should not make state law,[111] and that state law applied in federal court should not differ from state-court state law, while preserving for the

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[107] 28 U.S.C. § 2281 (1958).

[108] See, *e.g.*, Harrison v. NAACP, 360 U.S. 167 (1959); Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959); Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

[109] 28 U.S.C. § 1253 (1958).

[110] Although federal courts may abstain in certain diversity cases, Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959), cannot be so broadly construed as to authorize abstention in all diversity cases in which state law is unclear. See Note, *Abstention: An Exercise in Federalism*, 108 U. Pa. L. Rev. 226, 247 (1959).

[111] See Kurland, *Mr. Justice Frankfurter, the Supreme Court and the Erie Doctrine in Diversity Cases*, 67 Yale L.J. 187, 214 (1957).

litigant his right to federal fact finding. Inter-jurisdictional certification may even be extended to the conflict of laws area to enable a state court to certify an unsettled question of another state's law to the highest court of that other state.[112]

VII. Proposed Model State Statute

A model state statute or rule of court incorporating this Note's conclusions and modifying the pioneering Florida statute would read as follows:

> Section 1. When it shall appear to the Supreme Court of the United States, any Court of Appeals of the United States, or any three-judge District Court of the United States that in the case before it an unsettled question of this State's law
>
> (1) is necessary to disposition of the case; and
>
> (2) (a) is so insulated that it can be answered without regard to other issues of law and fact in the case, or
>
> (b) is unseverable but the intertwined questions of law and findings of fact may be appropriately included in the certificate;
>
> in the interest of expeditious and authoritative determination, this question may be certified to the Supreme Court of this State, which may in its discretion answer a question so certified; *provided that* a question certified from a three-judge District Court of the United States shall have first been decided by that Court.
>
> Section 2. The certificate shall contain, in addition to the certified question, the ultimate findings of fact which gave rise to the question and parts of the record relevant thereto. However, the entire record may be included at the discretion of the federal certifying Court; or it shall be forwarded upon request to the Supreme Court of this State.
>
> Section 3. Whenever possible, hearing on certified questions shall be expedited on the docket of the Supreme Court of this State.
>
> Section 4. Briefs and oral argument shall be required on the question in the same manner as in all other cases in the Supreme Court of this State.
>
> Section 5. The answer to the certified question shall be accorded the same determinative and precedential force as any other appellate decision of the Supreme Court of this State.

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[112] See Vestal, *supra* note 52, at 643-44.